80-1042

NO.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

HENRY E. WILLIAMS,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether coercion is an essential element of the offense of obtaining property "under color of official right" under the Hobbs Act. (18 U.S.C. § 1951 (a)(b)(2)).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980
No.

HENRY E. WILLIAMS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, Henry E. Williams, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra)* is reported at 621 F.2d 123. The opinion of the district court (App. B, *infra)* is reported at 480 Fed. Supp. 1040.

JURISDICTION

A petition for re-hearing with suggestion for re-hearing *en banc* was denied on October 27, 1980. (App. C). This petition for a writ of certiorari has been filed within sixty days of the entry of that judgment. The jurisdiction of this Court is invoked under 28 U.S. Code §1254(1).

STATUTE INVOLVED

18 U.S. Code §1951(a)(b)(2) provides:

Interference with commerce by threats and violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10, 000 or imprisoned not more than twenty years, or both.

(b) As used in this section - -

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

The Petitioner, a member of the Jefferson Parish, Louisiana, School Board, received, without "demand or threats" (Govt. App.Br. 6), [1] $4,000 from one Brandin, a general contractor doing business with the School Board.

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[1] Govt.App.Br. page numbers are references to the Original Brief of the United States filed in the appellate court wherein the government either concedes, or is the declarant of the statement of facts referred to.

Arguiendo, but not conceding this controverted factual issue, the money was given to Williams because of his official position.

Harding, an officer with a corporation doing business with the School Board, loaned Williams $13,000, which he needed to defray Mrs. Williams' medical expenses and to ameliorate business problems. (Govt. App.Br. 9). He loaned Williams the money "for a number of reasons: he was a personal friend of Williams, he was sympathetic and empathic towards Williams and Williams was an influential member of the School Board." (Govt. App. Br. 9-10). Harding said that "he felt the transaction 'was a loan' and there was no specific offer to do anything in exchange for the money." (Govt. App. Br. 13).

Harding invited Williams and his wife to go with him to Las Vegas. Harding was unable to make the trip, so they went without him. (Govt. App. Br. 13).

These three transactions were the basis for the three counts in the indictment charging a violation of Title 18 U.S.C., §1951 (The Hobbs Act).

The jury rendered a verdict of guilty as to all counts.

Thereafter, Williams filed a motion in arrest of judgment alleging that the indictment was fatally defective in failing to charge an offense against the United States. In a supplemental motion, Williams, for the first time, attacked the constitutionality of §1951, stating that the statute was fatally vague, general and indefinite.

The district court issued an order arresting judgment and entered judgment in Williams' favor acquitting him on all counts. In so doing, it held that the "color of official right" part of the extortion definition of the Hobbs Act was unconstitutional. It stated in part:

"This case involves an unusual and apparently first attempt in this Circuit to apply the 'color of official right' part of the 'extortion' definition in the Hobbs Act to activities of a local public official not involving duress or fear of harm.

. . . .

"There is no allegation in the indictment, nor is there any evidence whatsoever, that the defendant used actual or threatened force, violence or fear, not even of economic loss, to induce the payments. The government's position is that 'force, violence or fear,' or the threat thereof, is not essential to the commission of the offense. . .

"Stripped of verbiage. . .the statute as charged in the indictment provides that 'Whoever obtains something of value from another, with his consent, induced under color of official right' is guilty of an offense against the United States. . . . .(T)he court holds that the part of the statute at issue is unconstitutionally vague and that therefore the indictment fails to state an offense. The motion in arrest is granted, the jury verdict is set aside, and the indictment is dismissed.

"Alternatively, we hold that even if its meaning is sufficiently clear to be constitutional, the statute does not mean what, at the government's request, the court charged it to mean. Therefore, although there was ample evidence to sup-

port the jury verdict based upon the government's theory and the court's charge as to the meaning of the statute, since the charge instructed the jury that an essential element of the crime, coercion, was not an element, and since there was no evidence of coercion, the conviction cannot stand. Accordingly, as an alternative to the order granting the motion in arrest of judgment, the court *sua sponte* sets aside its judgment denying defendant's motion for judgment of acquittal and grants the motion." (App. B, *infra*).

The Court of Appeals reversed and reinstated the jury verdict. (App. A, *infra*).

Judge Tate, concurring, said:

"Nevertheless, I feel impelled to state, for benefit of *en banc* consideration or further review, that – were the slate clean of prior decisions by other circuits – it is clear to me (as it was to the district judge) that the congressional intent to punish racketeering by extortion, with penalties of up to twenty years imprisonment, included that the extortion be by coercion, economic or otherwise. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Georgetown Law Journal, 1171, 1179-86 (1977)." (App. A, *infra*).

REASONS FOR GRANTING THE WRIT

Not only are there legal principles opposing the government's expansive application of the Hobbs Act's reach, but there are policy reasons as well.

The extension of the Hobbs Act, jurisdictionally

and substantively, by sanctioning the use of the "official right" language to prosecute local bribery, represents a significant deviation from this Court's long standing policy of construing criminal statutes strictly.

In addition to the doctrine of strict construction of criminal statutes, concern for the delicate nature of relationship between the federal and state governments supports the restrictive interpretation of the Hobbs Act proposed here.

Decisions in other circuits sanctioning the use of the Hobbs Act to prosecute local bribery were premised on an erroneous reading of the statute and its legislative history.

Finally, if as some prosecutors have urged, mere passive acceptance of money not due is sufficient to convict a public official of extortion, the statute, so construed, would be so ambiguous and over-broad as to be unconstitutionally vague. Normally acceptable and innocent activity might, when done by a public official, be construed as criminal, and it would be impossible to predict the Act's limits, if any, at the hands of resourceful prosecutors.

Such broad power to determine what activity may be proscribed is unsettling in the hands of honorable men; in the hands of vicious, zealous or overly ambitious prosecutors, it is terrifying.

To guard against such mischief, it is respectfully suggested that this Court make coercion an essential element of the offense of obtaining property "under color of official right" under the Hobbs Act.

I.

The decision of the Court of Appeals for the Fifth Circuit, although in accord with the decisions in eight other circuits, [2] is based on an inadequate analysis of both the congressional purpose underlying the passage of the Hobbs Act, and the history of the Common Law offense.

A. THE COMMON LAW OFFENSE [3]

At Common Law, extortion was a crime that could only be committed by a public official. Public office was a

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2. See *United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir.), *cert denied*, 429 U.S. 819, 97 S.Ct. 64,50 2d 79 (1976); *United States v. Trotta*, 525 F.2d 1096, 1099-1101 (2d Cir. 1975), cert. denied, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed. 2d794 (1976); *United States v. Kenny*, 462, F.2d 1205, 1229 (3rd Cir.), cert. denied, 409 U.S. 914, 93 S.Ct.233, 34 L.Ed.2d 176 (1972); *United States v. Price*, 507 F.2d 1349, 1350 (4th Cir. 1974) (Alternative holding); *United States v. Butler*, 618 F.2d 411 (6th Cir. 1980); *United States v. Staszcuk*, 502 F.2d 875, 878 & n.5 (7th Cir. 1974), modified in part on other grounds, 517 F.2d 52 (en banc), cert. denied 423 U.S. 837, 96 S.Ct. 65, 46 L.Ed.2d 56 (1975); *United States v. Brown*, 540 F.2d 364, 371-72 (8th Cir. 1976); *United Statec v. Hall*, 536 F.2d 313, 320-21 (10th Cir.), *cert. denied*, 429 U.S. 919, 97 S.Ct. 313, 50 L.Ed.2d 285 (1976).

3. This brief is drawn largely from the perceptive article by Prof. Charles F.C. Ruff, former Director, Watergate Special Prosecution Force, entitled *Federal Prosecution of Local Corruption: A Case Study on the Making of Law Enforcement Policy*, 65 Georgetown L.J. 1171 (1977).

necessary element of the crime. *Perkins on Criminal Law*, 2d Edition, 368; *United States v. Nardello*, 393 U.S. 286, 289 (1969). Blackstone described the crime as "an abuse of public justice, which consists in an officer's unlawfully taking, by color of his office, from any man, any money or thing of value, that is not due him, or more than is due, or before it is due." 4W. Blackstone *Commentaries* 141.

An in *Corpus Juris Secumdum:*

> (I)n the common law the term 'extortion' has acquired a technical meaning, and designates a crime committed by an officer of the law who, under cover or color of his office, unlawfully or corruptly takes any money or thing of value that is not due him, or more than is due, or before it is due. In a more enlarged sense, it signifies any *oppression* under color or pretense of right. 35 C.J.S. Extortion, 355-356 (Emphasis added).

What in the United States is considered to be the "classic" extortion offense did not develop in England until the early eighteenth century, and then in the form of a blackmail statute. The Waltham Black Act of 1722 created a vast number of new offenses, many of which were punishable by death. Among these was the prohibition against sending "any letter, without any name subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing," A subsequent statute made it a crime to attempt to extort by letters threatening to accuse of crime, and in 1776 extortion of

money by verbal threat to accuse a man of unnatural practices was held to be robbery. These larceny-type offenses were collected in the Larceny Acts of 1871 and 1916, and were codified under the heading of "Blackmail" in the Theft Act of 1968:

(1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief;

(a) that he has reasonable grounds for making the demand; and

(b) that the use of the menaces is a proper means of reinforcing the demand.

(2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces related to action to be taken by the person making the demand.

(3) A person guilty of blackmail shall on conviction or indictment be liable to imprisonment for a term not exceeding fourteen years.

Ruff at 1179 thru 1180. (Footnotes omitted).

B. THE ANTI-RACKETEERING ACT, 18 U.S.C. §420 (1934)

Did Congress intend to reach local corruption by creating a felony punishable by 20 years in prison without requiring proof of intent to be influenced in one's official capacity or of intent to obtain property by force or threats?

Initial inquiry into the intended reach of the Hobbs Act necessarily includes the reach of its predecessor, the

Anti-Racketeering Act of 1934. The purposes and application of the Anti-Racketeering Act are important for two reasons. First, the language of the two acts is similar. Second, much of the Hobbs Act hearings and debate concentrated on the inclusion of activities found by the Supreme Court to be outside the purview of the Anti-Racketeering Act of 1934 in *United States v. Local 807*, 315 U.S. 521 (1942). [4]

Therefore, consideration of the scope of the Anti-Racketeering Act helps in determining more precisely the intended reach of the Hobbs Act.

Prior to the passage of the Anti-Racketeering Act, broad based hearings were conducted. [5] While fundamentally

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4. The Anti-Racketeering Act, 18 U.S.C. §420 (1934) reads in pertinent part:

> §420A. *Interference with trade and commerce by violence, threats, etc:*
>
> Any person who, in connection with or in relation to any act in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce - -
>
> a. Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee; or
>
> b. Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right.

5. *Hearings Before the Senate Comm. on Commerce, Investigation of the Matter of So-Called "Rackets" With a View of Their Suppression*, 73rd Cong.2d Sess., vols. 1 and 11, pts. 1-6 (1933-34).

concerned with racketeering, the hearings failed to clarify the meaning or scope of the offense and contributed to the amorphous quality of racketeering. See *United States v. Culbert*, 435 U.S. 371, 373 (1978).

But one thing is clear: nowhere in the legislative history of the Anti-Racketeering Act is there one word disclosing a Congressional intent to reach corrupt demands by local officials. For that matter, nor is there one word on the subject in the legislative history of the Hobbs Act. Debate on the Hobbs Act was concerned almost entirely with the Act's effect on organized labor. See, Note, *A New Federal Antiracketeering Law*, 35 Geo. L.J. 362, 364 n.23 (1947).

C. THE FIRST TWENTY YEARS AFTER PASSAGE OF THE HOBBS ACT.

For more than twenty years after passage of the Hobbs Act the activity pursued by federal prosecutors almost invariably involved labor officials threatening strikes or work stoppages unless their victims consented to pay extortionist fees. [6]

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6. See, e.g., *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Kramer*, 355 F.2d 891 (7th Cir. 1966); *United States v. Critchley*, 353 F.2d 358 (3rd Cir. 1965); *United States v. Provenzano*, 334 F.2d 678 (3rd Cir. 1964); *United States v. Tolub*, 309 F.2d 286 (2d Cir. 1962); *Cape v. United States*, 283 F.2d430 (9th Cir. 1960).

At the circuit court level the conviction in *Stirone* was affirmed. The Supreme Court reversed on a variance issue. Judge Hastie dissented at the circuit court level on the grounds that the Hobbs Act was being extended too far:

Finally it should be considered and kept in mind

D. UNITED STATES vs. KENNY

Until 1947, there was little detailed analysis of the federal offense of extortion. (18 U.S.C. § 872). In *United States v. Sutter,* 160 F.2d 754 (7th Cir. 1947), Judge Minton, for the Court, held that the federal extortion statute required a greater showing than was necessary at common law. Relying on a dictionary definition of extortion, he held that a federal employee commits extortion when he "uses his office to place another under compulsion of fear, force, or the undue exercise of power, so that such person parts with something of value unwillingly and involuntarily." *Sutter* at 746. In dictum however, Judge Minton went on to say that the common law "color of public office took the place of the force, threats, or pressure implied in the ordinary meaning of the word extortion," *Sutter* at 746, an explanation wholly at odds with the true common law origins of the offense, but later relied on by some courts to de-

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that the control and punishment of local extortion is primarily the business of local or state government. The Hobbs Act is auxiliary and partially duplicating federal superimposition on state law enforcement. In the view of Congress this is a desirable measure of federal assistance to the States in the exercise of their police power. But where state power and responsibility are thus primary and the national government is merely performing an auxiliary function, we should not be eager to stretch federal jurisdiction to cover doubtful cases offering only a tenuous or speculative theory of federal jurisdiction. 262 F.2d 571, 579 (3rd Cir. 1958).

fine the scope of the parallel provisions of the Hobbs Act. See *Bianchi v. United States,* 219 F.2d 182, 193 (8th Cir.) (Common law rule that color of office takes place of force, threat, and pressure in case of public official not applicable to union official), cert. denied, 349 U.S. 915 (1955).

In *United States v. Kubacki,* 237 Fed. Supp. 638 (E.D. Pa.,*1965*), where the mayor of Reading, Pa., had been charged with extortion under the Hobbs Act and bribery under the Travel Act (18 U.S.C., §1952), the district court held that the two offenses were mutually exclusive, and then acquitted him on the extortion charge. This same distinction was raised subsequently by Judge Wisdom in *United States v. Hyde,* 448 F.2d 815, 832-33 (1971).

The distinction was erased in *United States v. Kenny,* 462 F.2d 1205, 3d Cir., cert. denied, 409 U.S. 914 (1972), where the indictment alleged that the political boss of Hudson County, New Jersey obtained property with consent induced by "the wrongful use of fear *and* under color of official right." *Id.* at 1210 (Emphasis added.) In affirming the conviction the Third Circuit rejected the appellant's objection to a disjunctive definition of extortion on the ground that the Act "repeats the common-law definition of extortion, a crime which could only be committed by a public officer and which did not require proof of threat, fear or duress." *Id.* at 1229.

It was on the basis of this "perfunctory analysis of both the congressional purpose underlying the passage of the Hobbs Act and the history of the common-law offenses," *Ruff*

at 1178, that the *Kenny* decision was swiftly adopted by the First, (*United States v. Hathaway,* 534 F.2d 386, 394 (1st Cir.) cert. den., 97 S.Ct. 64 (1974)), Second, (*United States v. Trotta,* 525 F.2d 1096, 1098-99 (2nd Cir. 1975), cert. den., 425 U.S. 971 (1976)), Fourth, (*United States v. Price,* 507 F.2d 1349, 1350 (4th Cir. 1974)), Seventh, (*United States v. Staszcuk,* 502 F.2d 875, 877-78 (7th Cir. 1974) Rev'd in part *en banc* 617 F. 2d 53 (1975) cert. den., 423 U.S. 837 (1976)), Eighth, (*United States v. Brown,* 540 F.2d 364, 372 (8th Cir. 1976)), and Tenth Circuits, (*United States v. Hall,* 536 F.2d 313, 316-17, 320 (10th Cir.) cert. den. 97 S.Ct. 311 (1976)).

Kenny has not been without its critics. Judge Aldisert, dissenting in *United States v. Cerilli,* 603 F.2d 415, at 427, (3rd Cir. 1979), observed that *Kenny* "resulted in a perpetuation of erroneous law not only in (the Third Circuit), but in the First, Second, Fourth, Seventh, Eighth, and Tenth Circuits which have followed (the Third Circuit) lead without setting forth a reasoned elaboration for their conclusions."

Judge Aldisert went on to say:

> "It is now my view that our interpretation in *Kenny* and its progeny is not supported by the legislative intent underlying the Hobbs Act nor is it historically accurate." *United States v. Cerilli,* supra, 603 F.2d at 427.

And, in a fetching show of contrition, he said:

> "I readily acknowledge that I had the opportunity of taking my present stand in earlier cases of

> this court, particularly in *United States v. Mazzei,* 521 F.2d 639 (3rd Cir.) (en banc), cert. denied 433 U.S. 1014, 96 S.Ct. 446, 46 L.Ed.2d 385 (1975), in which I joined Judge Gibbons' dissent, an opinion that, in my view, moved somewhat nearer the view I now adopt, but which nevertheless respected the vitality of *Kenny.* A famous statement of Justice Frank-Furter provides me refuge: 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' *Henslee v. Union Planters Bank,* 335 U.S. 595, 600, 69 S.Ct. 290, 293, 93 L.Ed. 259 (1949) (dissenting)." *Id.* n.4.

Judge Tate concurred reluctantly in the panel decision below. (App. A):

> "Nevertheless, I feel impelled to state, for benefit of en banc consideration or further review, that – were the slate clean of prior decisions by the other circuits -- it is clear to me (as it was to the district judge) that the congressional intent to punish racketeering by extortion, with penalties of up to twenty years imprisonment, included that the extortion be by coersion, economic or otherwise. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy,* 65 Georgetown Law Journal 1171, 1179-86 (1977)."

. . . . . .

He voiced his "personal reservations as to the correctness of these decisions in their misreliance upon inapposite judicial decisions rather than upon the congressional intent. . ." (App. A).

CONCLUSION

Since *Kenny,* federal prosecutors have, by slight encroachments, expanded the application of the Hobbs Act to factual situations which border on the trivial and frightening. Here, for example, the petitioner was charged, in one count of the indictment, in having taken a trip to Las Vegas, an act for which, arguably, he could have been sentenced up to 20 years. This alone should invite a closer look at the meaning of the "under color of official right" language.

Without disrespect, it is just possible that here, as in *United States v. Maze,* 414 U.S. 395, 398, n.2 (1973), all of the circuits have been wrong.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1980

Counsel for Petitioner

CERTIFICATE OF SERVICE

This is to certify that copies of the Petition for Writ of Certiorari have have served upon the United States of America by placing three copies thereof in the United States Mail, postage prepaid, addressed to The Honorable Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, and by placing three copies thereof in the United States Mail, postage prepaid, addressed to the Honorable John Volz, United States Attorney for the Eastern District of Louisiana, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130. I further certify that all parties required to be served have been served.

New Orleans, Louisiana, this 23rd day of December, 1980.

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Of Counsel for Petitioner

APPENDIX A

UNITED STATES v. WILLIAMS

UNITED STATES of America,
Plaintiff-Appellant
v.
Henry E. WILLIAMS,
Defendant-Appellee.
No. 79-2584
Summary Calendar.
United States Court of Appeals,
Fifth Circuit.
July 7, 1980.

Government appealed dismissal by the United States District Court for the Eastern District of Louisiana, Adrian G. Duplantier, J., 480 F.Supp. 1040, of an indictment alleging criminal extortion by a local public official under the Hobbs Act. The Court of Appeals, Roney, Circuit Judge, held that : (1) defendant's conviction could be sustained absent a showing of actual or threatened force, violence, or fear, and (2) the Act was not unconstitutionally vague.

Reversed and remanded.

Tate, Circuit Judge, concurred and filed opinion.

1. Extortion and Threats - - 7

A conviction for extortion under the Hobbs Act may be sustained upon a finding that property was unlawfully obtained under color of official right, absent a showing of actual or threatened force, violence, or fear. 18 U.S.C.A. §1951(b)(2).

2. Extortion and Threats - - 7

Proof of coercion was not necessary to sustain con-

viction of school board member for extortion under the Hobbs Act. 18 U.S.C.A. §1951(b)(2).

3. Extortion and Threats - - 2

Terms of Hobbs Act were not unconstitutionally vague in that they gave person of ordinary intelligence a reasonable opportunity to know what was prohibited, so that he may act accordingly. 18 U.S.C.A. §1951.

Richard T. Simmons, Jr., Asst. U.S. Atty., New Orleans, La., for plaintiff-appellant.

Virgil M. Wheeler, Jr., New Orleans, La., Herbert Shafer, Atlanta, Ga., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RONEY, KRAVITCH and TATE, Circuit Judges.

RONEY, Circuit Judge:

The Government here appeals the dismissal of an indictment alleging criminal extortion by a local public official under the Hobbs Act. 18 U.S.C.A. §1951. The district court held the statute unconstitutionally vague and, alternatively, held that proof of coercion is necessary to sustain a conviction for extortion under the Act. *See* 18 U.S.C.A. §1951(a), (b)(1). We reverse the district court on both of these holdings, and order that the jury verdict of guilty be reinstated.

Procedurally, defendant, an elected member of the school board for Jefferson Parish, Louisiana, was charged in a three-count indictment with knowingly, willfully and unlaw-

fully affecting interstate commerce by soliciting and receiving, from a contractor doing business with the school board, airline tickets and cash to which neither he nor his office was entitled. Defendant was convicted on all three counts by a jury. Thereafter the district court granted a motion in arrest of judgment, set aside the jury verdict, and dismissed the indictment on the ground that the statutory prohibition against "obtaining . . . under color of official right" is unconstitutionally vague. Fed. R. Crim. P. 34. Alternatively, the court set aside its previous denial of defendant's motion for acquittal and granted the motion on the ground that, even if the statute is sufficiently clear to pass constitutional muster, coercion is an essential element of the crime and was admittedly not proved.

The Hobbs Act proscribes extortion in furtherance of a plan in violation of the Act. *See generally United States v. Culbert,* 435 U.S. 371, 98 S.Ct. 1112, 55 L.Ed.2d 349 (1978). The critical portion of the Act appears in the definition of "extortion."

> (2) The term "extortion" means the *obtaining of property from another,* with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or *under color of official right.*

18 U.S.C.A. §1951(b) (critical words italicized). The Government concedes there was no allegation or evidence that defendant threatened force, violence or fear to induce the payments. In instructing the jury, the district court stated,

> To prove the crime charged in this case, the government need not prove that the payments to the defendant

> were the result of force or coercion on his part or from fear on the part of the giver.

It is this charge that the district court later held to be error.

To date, eight circuits have directly held that Hobbs Act violations based on extortion by a public official need not include proof of threat, fear or duress. *See United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir.), *cert. denied*, 429 U.S. 819, 97 S.Ct. 64, 50 L.Ed.2d 79 (1976); *United States v. Trotta*, 525 F.2d 1096, 1099-1101 (2d Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976); *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir.), *cert. denied*, 409 U.S. 914, 93 S.Ct. 233, 34 L.Ed.2d 176 (1972); *United States v. Price*, 507 F.2d 1349, 1350 (4th Cir. 1974)(alternative holding); *United States v. Harding*, 563 F.2d 299,306-07 (6th Cir. 1977), *cert. denied* 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978); *United States v. Staszcuk*, 502 F.2d 875, 878 & n.5 (7th Cir. 1974), *modified in part on other grounds*, 517 F.2d 53 (*en banc*), *cert. denied*, 423 U.S. 837, 96 S.Ct. 65, 46 L.Ed.2d 56 (1975); *United States v. Brown*, 540 F.2d 364, 371-72 (8th Cir. 1976); *United States v. Hall*, 536 F. 2d 313, 320-21 (10th Cir.), *cert. denied* , 429 U.S. 919, 97 S.Ct. 313, 50 L.Ed.2d 285 (1976). These courts have held that the disjunctive language of the extortion definition permits a conviction on a finding that property was unlawfully obtained *either* under color of official office *or* through force or duress. No circuit has held to the contrary. *See generally* Annot., 4 A.L.R. Fed. 881 (1970).

The language, "under color of official right," is consonant with the common law definition of extortion, which could be committed only by a public official taking a fee under color of his office, with no proof of threat, force or duress required, *See Perrin v. United States*, 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed.2d 199, 206-208 (1979); *United States v. Nardello*, 393 U.S. 286, 289, 89 S.Ct. 534, 536, 21 L.Ed.2d 487 (1969); *United States v. Hathaway*, 534 F.2d at 393; R. Perkins, Criminal Law 367-71 (2d ed. 1969). The coercive element is supplied by the existence of the public office itself. *United States v. Hathaway*, 534 F.2d at 393; *United States v. Mazzei*, 521 F.2d 639, 644-45 (3d Cir.) (*en banc*), *cert. denied*, 423 U.S. 1014, 96 S.Ct. 446, 46 L.Ed.2d 385 (1975). "Threats, fear and duress became express elements only when the crime was later broadened to include actions by private individuals, who had no official power to wield over their victims." *United States v. Hathaway*, 534 F.2d at 393 (citing *United States v. Crowley*, 504 F.2d 992 (7th Cir. 1974); *United States v. Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914, 93 S.Ct. 233, 34 L.Ed.2d 176 (1972)).

[1,2] With so many decisions on point, extended discussion is unnecessary. Considering the reasoning of these cases persuasive, we hold that a conviction under the Hobbs Act may be sustained upon a finding that property was unlawfully obtained under color of official right, absent a showing of "actual or threatened force, violence, or fear, . . . " 18 U.S.C.A. §1951(b)(2). This decision disposes of the district court's al-

ternative action in directing acquittal.

The district court held there was ample evidence to support the jury verdict under the court's charge for this meaning of the statute. This leaves the question of whether the Hobbs Act is unconstitutionally vague.

Although this Circuit has never ruled on a constitutional challenge to the specific portion of the Hobbs Act under which defendant was charged, convictions under the Hobbs Act in the face of general constitutional attacks have been sustained. *See, e.g., United States v. Quinn,* 514 F.2d 1250, 1268 (5th Cir. 1975), *cert. denied,* 424 U.S. 955, 96 S.Ct. 1430, 47 L.Ed.2d 361 (1976); *Bianchi v. United States,* 219 F.2d 182, 196 (8th Cir.), *cert. denied,* 349 U.S. 915, 75 S.Ct. 604, 99 L.Ed. 1249 (1955).

[3] The issue is whether the words of the statute are sufficient to inform a public official of conduct that is subject to criminal sanctions. We hold the terms of this statute to be sufficiently precise to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972); *see United States v. Mazzei,* 390 F.Supp. 1098, 1104-05 (W.D. Pa.), *aff'd in part and modified in part,* 521 F.2d 639 (3d Cir.) (*en banc*), *cert. denied,* 423 U.S. 1014, 96 S.Ct. 446, 46 L.Ed.2d 385 (1975). *See generally United States v. Quinn,* 514 F.2d at 1268; *Bianchi v. United States,* 219 F.2d at 196. It cannot be gainsaid that the statute on its face encompasses bribery

of a public official, and that "under color of official right" has a "meaning, as a legal term of art, [that] is well-defined." *United States v. Trotta,* 525 F.2d at 1100; *see United States v. Braasch,* 505 F.2d 139, 151 & n.8 (7th Cir. 1974), *cert. denied,* 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975).

In *United States v. Culbert,* 435 U.S. 371, 98 S.Ct. 1112, 55 L.Ed.2d 349 (1978), a defendant tried under the Hobbs Act claimed a "racketeering" requirement should be read into the statute. In rejecting the defendant's proposed construction and his vagueness attack, the Court noted: "[W]e need not concern ourselves with these potential constitutional difficulties because a construction that avoids them is virtually compelled by the language and structure of the statute." 435 U.S. at 374, 98 S.Ct. at 1114. The Court found no need to invoke the doctrine that any ambiguity be resolved in favor of lenity, because the Court found no ambiguity in the statute. 435 U.S. at 371, 98 S.Ct. at 1112; *see United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820); *cf. United states v. Enmons,* 410 U.S. 396, 411, 93 S.Ct. 1007, 1015, 35 L.Ed.2d 379 (1973) (Court rejects Government's suggestion that meaning of Hobbs Act's definition of extortion be expanded, noting that criminal statutes must be construed strictly). "[H]ere Congress has conveyed its purpose clearly, and we decline to manufacture ambiguity where none exists." *United States v. Culbert,* 435 U.S. at 379, 98 S.Ct. at 1116. The Court concluded "that Congress intended to make criminal all conduct within the reach of the statutory language." 435 U.S. at 380, 98 S.Ct. at 1117.

Such a broad reading was recently reaffirmed by this Court in *United States v. Summers*, 598 F.2d 450, 454 (5th Cir. 1979). *See also Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 272, 4 L.Ed.2d 252 (1960); *United States v. Chiantese*, 582 F.2d 974, 980 (5th Cir. 1978), *cert. denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979); *United States v. Hyde*, 448 F.2d 815, 837 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972). *But cf. United States v. Enmons*, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973) (Hobbs Act held inapplicable to use of violence to achieve legitimate union objectives). The absence of any ambiguity in the statute and the concomitantly broad reading which the Supreme Court and this Circuit have ascribed to the Hobbs Act support the conclusion that it is not unconstitutionally vague on its face. We so hold.

The evidence here showed that when defendant, a member of the school board, made his requests for money, the other parties were aware of his public office. *United States v. Braasch*, 505 F.2d at 151. One payor, Arthur Brandin, testified that if defendant had not been a school board member, he would not have given defendant $4000. The evidence demonstrated that defendant accepted the money and gratuities, knowing he was not entitled to them in the discharge of his lawful duties, and that payment was induced by his official position. Neither on its face nor as applied in this case is the Hobbs Act unconstitutionally vague. The district court's decision is reversed, and the case is remanded for reinstatement of the jury

verdict of guilty on three counts of violating 18 U.S.C.A. §1951, and further appropriate proceedings.

Having decided this case in the screening process without oral argument, it is unnecessary to rule on the Government's motion to expedite.

REVERSED AND REMANDED.

TATE, Circuit Judge, concurring:

I agree with the majority that summary calendar treatment is appropriate, since (a) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument and (b) under the current state of the law, the dispositive issue has been authoritatively decided by decisions of eight of the circuits. F.Rule App.Pro., Rule 34(a) (as amended and adopted in 1979); Local Rule 18, United States Court of Appeals for the Fifth Circuit Local Rules. I further agree completely with the majority that the definition of "extortion" in the Hobbs Act as obtaining property "*under color of official right,*" 18 U.S.C.A. §1951(b)(2), does not, by reason of the italicized phrase, invalidate the statute as unconstitutionally vague.

Nevertheless, I feel impelled to state, for benefit of en banc consideration or further review, that - were the slate clean of prior decisions by the other circuits - it is clear to me (as it was to the district judge) that the congressional intent to punish racketeering by extortion, with penalties of up to twenty years imprisonment, included that the extortion be by

coercion, economic or otherwise. [1] Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Georgetown Law Journal 1171, 1179-86 (1977).

Here, a local school board member accepted a bribe voluntarily given, without any element of duress, in the justified expectation of receiving favorable public contracts - conduct to be roundly condemned and subject to prosecution under state law (not federal law, absent interstate travel). Much as we may deplore such conduct and wish for its extirpation and punishment, respect for our federal system demands that, in the absence of congressional intent validly exercised, local criminal conduct be punishable through prosecution by the state rather than by the central government.

United States v. Kenny, 462 F.2d 1205, 1229 (3rd Cir. 1972), first held that conduct is punishable under the 1934 Hobbs Act - i.e., obtaining property "by wrongful use of actual or threatened force, violence, or fear, or *under color of official right*" - without proof of an element of duress when

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1. As stated for the court by Judge Wisdom, in an opinion which accepted as undisputed this concept: "It is the wrongful use of an otherwise valid power that converts dutiful action into extortion. If the purpose and effect are to intimidate others, forcing them to pay, the action constitutes extortion . . . The distinction from bribery is therefore the initiative and purpose on the part of the official and the fear and lack of voluntariness on the part of the victim." *United States v. Hyde*, 448 F.2d 815, 833 (5th Cir. 1971).

property is obtained by a public official "under color of official right." The dissenting opinion of Judge Aldisert in *United States v. Cerilli*, 603 F.2d 415, 427 (3rd Cir. 1979), is to me convincing that the authorities relied upon by *Kenny* were inapposite and that the congressional history discloses a clear legislative intent *not* to include non-coercive conduct within the intended meaning of the prohibited obtaining of property "under color of official right." Nevertheless, the United States Supreme Court denied certiorari when review was sought on this basis. *Cerilli v. United States*, 444 U.S. 1043, 100 S.Ct. 728, 62 L.Ed.2d 728 (1980).

Under the circumstances, therefore, and even conceding that the denial of certiorari did not necessarily constitute approval, I do not believe that oral argument would be of significant aid in the decisional process but, rather, would unduly delay panel decision of what a preponderance of the court might reasonably agree was a dispositive issue authoritatively decided by eight other circuits. Despite my personal reservations as to the correctness of these decisions in their misreliance upon inapposite judicial decisions rather than upon the congressional intent, I therefore respectfully concur.

APPENDIX B

UNITED STATES of America
v.
Henry E. WILLIAMS.
Crim. A. No. 79-46.
United States District Court,
E.D. Louisiana.
June 20, 1979.

Defendant, who was convicted on all counts of a three-count indictment charging violations of Hobbs Act, filed a motion in arrest of judgment, challenging the constitutionality of the Hobbs Act. The District Court, Duplantier, J., held that: (1) as applied to prosecution of defendant member of school board for solicitation of a bribe without use of threat or duress, Hobbs Act was unconstitutionally vague, and (2) even if "color of official right" part of "extortion" definition in Hobbs Act is constitutional, it does not cover solicitation by a public official of a bribe or of a gratuity, absent element of threat or duress.

Motion in arrest of judgment granted and, alternatively, judgment denying defendant's motion for judgment of acquittal set aside and such motion granted.

1. Criminal Law - - 13.1(1)

Test to be applied when a criminal statute is challenged for vagueness is whether terms of statute are sufficiently precise to give person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.

2. Extortion and Threats - - 2

As applied to prosecution of defendant member of school board for solicitation of a bribe without use of threat or duress, Hobbs Act was unconstitutionally vague. 18 U.S.C.A. §§1951, 1951(b)(2).

3. Extortion and Threats - - 7

Even if "color of official right" part of "extortion" definition in Hobbs Act is constitutional, it does not cover solicitation by a public official of a bribe or of a gratuity, absent element of threat or duress. 18 U.S.C.A. §§1951, 1951(b)(2).

Richard T. Simmons, Jr., Asst. U.S. Atty., Chief, Crim. Div., Geoffrey L. Beauchamp, Asst. U.S. Atty., New Orleans, La., for plaintiff.

Virgil M. Wheeler, Jr., New Orleans, La., for defendant.

ORDER AND REASONS

DUPLANTIER, District Judge.

This case involves an unusual and apparently first attempt in this Circuit to apply the "color of official right" part of the "extortion" definition in the Hobbs Act to activities of a local public official not involving duress or fear of harm.

Defendant, Henry Williams, was convicted by a jury on all counts of a three count indictment charging violations of 18 U.S.C. §1951, known as the Anti-Racketeering Act or the Hobbs Act, which, *inter alia*, prohibits "extortion"

affecting interstate commerce. [1]

(Subsequent to the publication of this opinion, we found for the first time an exhaustive and scholarly treatment of many of the issues in this case in a law review article published about two years before the trial herein. Ruff, "Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy." 65 Geo. L.J. 1171 (1977).)

"Extortion" is defined in subsection (b)(2) of the act:

> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Each count of the indictment charges that defendant, while a member of the Jefferson Parish, Louisiana, School Board, an elective office, "did knowingly, willfully and unlawfully attempt to and did . . . affect interstate commerce. . . by means of extortion, in that the defendant, did unlawfully seek, ask, solicit, and receive, under the color of official right. .

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1. The act provides:

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

[either a cash sum (Counts One and Two) or airline tickets (Count Three)], not due him or his office and to which neither he nor his office was entitled. . ." The indictment is set forth in full in an Appendix hereto.

There is no allegation in the indictment, nor is there any evidence whatsoever, that the defendant used actual or threatened force, violence or fear, not even fear of economic loss, to induce the payments. The government's position is that "force, violence or fear", or the threat thereof, is not essential to the commission of the offense. As stated in its Reply to Defendant's Supplemental Motion In Arrest of Judgment, the government contends that a local public official violates the statute (assuming requisite effect upon interstate commerce) if he "accepts money or things of value knowing that he is not entitled to these gratuities for the lawful discharge of his duties and, secondly, that the payment of those gratuities were (sic) induced by his official position."

On more than one occasion during pretrial conferences, in response to the court's inquiries the government confirmed that it intended to produce no evidence that defendant represented to the "donor" that he was entitled by virtue of his public office to the property he obtained, nor that there was actual or threatened fear, express or implied, of economic loss. The government's contention, based upon the disjunctives in the statutory definition, as applied here, is that the statute proscribes "the obtaining of property from another, with his consent under color of official right," which includes accepting

gratuities and bribes. In defining extortion in its charge to the jury, the court included the term "induced" before "under color of official right", on the basis that the defendant is entitled to the strict interpretation of a criminal statute and that "induced" could modify every phrase thereafter. The pertinent part of the charge is attached as an Appendix hereto. The court also included another element not specified in the statutory definition, i.e., that there must be an indication by the defendant to the "donor" that defendant will favor the "donor" in defendant's official capacity. In effect, the court acceded to the government's contention that, in this case, extortion is synonymous with the solicitation of a bribe. [2]

By a motion in arrest of judgment under Rule 34, Fed.R.Cr.P., Williams for the first time raised the contention that as applied to this case, the Hobbs Act is unconstitutionally vague. [3] His challenge centers on the words "under color of official right" in the statute's definition of extortion, used in

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2. The defendant requested no special charges nor did he object to the court's charges.

3. The court is of the opinion that the motion is timely under Rule 34, since it raises the point that the indictment does not charge an offense. If Rule 12(b)(2) requires the filing of the motion prior to trial, the court grants under Rule 12(f) "relief from the waiver" otherwise resulting. To do otherwise would result in an injustice to the defendant by penalizing him for his attorney's failure to raise the point earlier. To hold that the objection is waived would be especially inappropriate where, as here, the government concedes that it would not have sought an amended indictment if the issue had been raised pretrial.

each count of the indictment. If the statute is impermissibly vague, then the indictment which tracks the statutory language fails to charge an offense and defendant's conviction cannot stand.

Stripped of verbiage which is either inapplicable or of no consequence, and reconstructed to illustrate the issue more clearly, the statute as charged in the indictment provides that "Whoever obtains something of value from another, with his consent, induced under color of official right" is guilty of an offense against the United States. For the following reasons, the court holds that the part of the statute at issue is unconstitutionally vague and that therefore the indictment fails to state an offense. The motion in arrest is granted, the jury verdict is set aside, and the indictment is dismissed.

Alternatively, we hold that even if its meaning is sufficiently clear to be constitutional, the statute does not mean what, at the government's request, the court charged it to mean. Therefore, although there was ample evidence to support the jury verdict based upon the government's theory and the court's charge as to the meaning of the statute, since the charge instructed the jury that an essential element of the crime, coercion, was not an element, and since there was no evidence of coercion, the conviction cannot stand. Accordingly, as an alternative to the order granting the motion in arrest of judgment, the court *sua sponte* sets aside its judgment denying defendant's motion for judgment of acquittal and grants the motion.

[1,2] The test to be applied when a criminal

statute is challenged for vagueness is whether the terms of the statute are sufficiently precise to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972). The court finds that the statute, as employed in this indictment, fails to meet this test.

In a recent decision, *Dunn v. United States,* – U.S. –, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979), the Supreme Court reaffirmed its "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity."

This practice reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. Thus, to ensure that the legislature speaks with special clarity when marking the boundaries of criminal conduct, the courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed. [citations omitted] 99 S. Ct. at 2197.

There is apparently no specific discussion as to the meaning of the phrase "under color of official right" in the legislative history of the Hobbs Act. The language seems to have been derived from Section 850 of the New York Penal Law of 1909:

> Extortion is the obtaining of property from another, or the obtaining of the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right. [4]

The New York law, it should be noted, is different from the common law definition of extortion. Under the common law, extortion was defined as "the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or the taking of more than is due, or the taking of money before it is due." [5]

There are at least two important distinctions between the common law definition of extortion and that in the Hobbs Act: The common law refers to "unlawful taking", the Hobbs Act merely to "obtaining"; at common law the "taking" must be "by any officer by color of his office", under Hobbs the "obtaining" must be "under color of official right." [6]

Whatever the elements of the crime of extortion

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4. Penal Law of 1909, §850, as amended, Laws of 1917, ch, 518, reprinted in N.Y. Penal Law, appendix §850 (McKinney 1967).

5. *U.S. v. Laudani*, 134 F.2d 847, 851 (3rd Cir. 1943); see *Words and Phrases*, "Extortion", 31 *Am.Jur.2d* "Extortion, Blackmail and Threats", 35 *C.J.S.*'s "Extortion" and cases cited therein. For a full discussion of the legislative history of the Hobbs Act and the origins of the statutes definition of extortion, see the dissenting opinion of Judge Gibbons in *U.S. v. Mazzei*, 521 F.2d 639 at 646 (3rd Cir. 1975). *See also, U.S. v. Harding*, 563 F.2d 299 (6th Cir. 1977).

6. For an interesting analysis of questions of interpretation of the Hobbs Act as applied in a number of recent public official prosecutions, *See 5 Loyola, U.L.J.* 513 (1974).

may be under the common law or under state statutes which adopted similar wording, the issue to be decided is whether the words of this particular statute are sufficient to give a present day public official fair warning as to what conduct may be subject to the sanctions of the criminal law. This statute cannot be made constitutional by incorporation of some historic definition of extortion, for the statute itself defines the term, and the indictment refers to only the stated part of the definition. In any event, we have been referred to no historic definition of "obtaining . . . induced . . . under color of official right"; indeed, this terminology is apparently of recent origin, whatever it may mean.

There are a number of questions as to what activities are meant to be covered by the statute. As a matter of syntax, the statute is clearly disjunctive; the offense is committed if one obtains property of another induced *either* by "wrongful use of actual or threatened force, violence, or fear", or "under color of official right". [7] As already noted, the indictment charges only the latter activity, not the former. However, the structure of the statute also makes clear that the word "wrongful" in the definition cannot be held to modify "under color of official right." Yet, some courts have read into the statute a requirement that a defendant use his office "wrongfully." [8] The

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7. See *U.S. v. Kenny*, 462 F.2d 1205, 1229 (3rd Cir. 1972).

8. *U.S. v. Kenny*, 462 F.2d 1205 (3rd Cir. 1972); *U.S. v. Braasch*, 505 F.2d 139 (7th Cir. 1974).

indictment at issue here charges that the defendant did "unlawfully seek . . . and receive . . .". By describing activity as "unlawful" an indictment cannot make it so, nor thus cure an otherwise unconstitutional statute. The statute also leaves open the question of whether the official must initiate the transaction, that is, make a demand for the money or property. There is a question whether the word "induced" in subsection (b)(2) applies to a case brought solely under the "official right" portion of the disjunctive statutory definition. As already noted, the jury was charged that the word "induced" was part of the applicable statute and that the government had to prove that the defendant initiated the transaction. Just as an indictment cannot cure defects in the statute, neither can the court's charge.

Apparently, it is only relatively recently that prosecutions under the Hobbs Act have been brought against public officials solely under the "official right" portion of the statute, that is, where there is no allegation of force, threats or duress. [9]

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9. The Court in *U.S. v. Staszcuk*, 502 F.2d 875, 877 (7th Cir. 1974) remarked, "Apparently this is one of the first prosecutions under section 1951 to rely solely on subsection (b)(2)'s definition of extortion as 'the obtaining of property from another, with his consent, induced. . under color of official right'." Other cases, while discussing the meaning of "under color of official right," have affirmed convictions on the alternative finding that "fear of economic loss" was present. *U.S. v. Sopher*, 362 F.2d 523 (7th Cir. 1966); *U.S. v. Irali*, 503 F.2d 1295 (7th Cir. 1974); *U.S. v. Crowley*, 504 F.2d 992 (7th Cir. 1974); *U.S. v. Price*, 507 F.2d 1349 (4th Cir. 1974); *U.S. v. Brown*, 540 F.2d 364 (8th Cir. 1976); *U.S. v. Adcock*, 558 F.2d 397 (8th Cir. 1977); *U.S. v. Reilly*, 456 F.Supp. 211 (E.D.Pa. 1978), affirmed, 601 F.2d 577 (3rd Cir. 1979).

In some reported cases, the issue has arisen as to whether the statute covers bribery of a public official, where the payor suggests the scheme and makes the payment freely and voluntarily. Some courts which have considered this issue have held that conduct constituting bribery is covered by the statute, i.e., that the crimes are not mutually exclusive. [10] However, the holdings in other cases imply that there must be some demand or threat made by the official in order to bring the transaction under the coverage of the Hobbs Act. [11]

Taken literally, the words "obtain property under color of official right" would seem to require that an official represent to another person that he is entitled to something of

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10. *U.S. v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974); *U.S. v. Hathaway*, 534 F.2d 386 (1st Cir. 1976); *U.S. v. Hall*, 536 F.2d 313 (10th Cir. 1976); *U.S. v. Harding*, 563 F.2d 299 (6th Cir. 1977).

11. See *e.g.*, *U.S. v. Wright*, 588 F.2d 31 at 33 (2d Cir. 1978); *U.S. v. Addonizio*, 451 F.2d 49 (3rd Cir. 1972). In *U.S. v. Hathaway, supra*, the court commented that an instruction to the jury which implied that the initiative had to come ***solely*** from the official may have been more favorable to the defendant than required. However, the court was careful to determine that the instructions precluded a conviction based upon the passive receipt of money. *U.S. v. Hyde*, 448 F.2d 815 at 832-33 (5th Cir. 1971) seems to imply that some element of coercion or intimidation must be present for a prosecution under the Hobbs Act, although the coercion may consist of a threat to exert valid official power. On this general subject of bribery vs. extortion *see* Stern, "Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion"; 3 Seton Hall L. Rev. 1 (1971).

value, as of right, because of his official position, an interpretation which was rejected in *U.S. v. Braasch*, 505 F.2d 139 at 151 (7th Cir. 1974). In *Braasch*, the court defined the offense in these terms:

> The use of office to obtain payments is the crux of the statutory requirement of "under color of official right", and appellants' wrongful use of official power was obviously the basis of this extortion. See *United States v. Staszcuk*, 502 F.2d 875 (7th Cir. 1974). It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. §1951. That such conduct may also constitute "classic bribery" is not a relevant consideration.

This description of the offense has been followed and approved in other circuits [12] and is the definition urged by the government in the instant case.

Such an interpretation of the statute is quite broad in its coverage of activities by public officials. There is no requirement of a threat by the official; thus voluntary payments, commonly considered bribery, would be covered by the statute if solicited by the official. [13] A case where an official sells his

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12. *U.S. v. Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975); *U.S. v. Hathaway*, 534 F.2d 386 (1st Cir. 1976); *U.S. v. Harding*, 563 F.2d 299 (6th Cir. 1977); See also *U.S. v. Mazzei*, 521 F.2d 639 (3rd Cir. 1975).

13. See footnote 6, *supra*

power to influence public action, commonly known as influence peddling, would also be covered. [14] The crime could also include the receiving of something of value by a public official because of some official act he has performed or will perform, generally referred to as an illegal gratuity. Surely, in such a case "the motivation for the payment focuses on the recipient's office." In short, whatever meaning the common law attached to extortion, some recent circuit court opinions have given the term a much broader meaning which covers all sorts of political corruption or unethical conduct. This broad interpretation of the statute makes no distinction between corrupt or unlawful activity and certain legitimate activity, such as a campaign contribution.

Thus, if an incumbent candidate solicits campaign funds from individuals who are in a position to directly or indirectly benefit from his official decisions, this activity may be covered by the broad interpretation of the Hobbs Act. The payors in such a case may not make the payments except for the official's position of power, and they more than likely hope to gain some favorable treatment in exchange for their contributions. But do such solicitations consitiute extortion? Would the following?

> A public official solicits a loan from a bank. The loan is made; part of the motivation is the borrower's official position and the hope that the

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14. *See U.S. v. Mazzei*, 521 F.2d 639 (3rd Cir. 1975). Judge Gibbons' dissent takes issue with such a broad interpretation.

bank can benefit therefrom in the form of otherwise legitimate bank business.

A mayor solicits from an airline whose local terminal operations are regulated by his city an invitation to participate at no cost to him in a promotional inaugural foreign flight.

Through his "booking agent", a Congressman, member of a committee which considers bills relating to an industry, solicits a speech-making appearance (with honorarium) before the industry convention.

All of the foregoing would seem to fit the definition suggested by the government.

Congress has adopted a comprehensive scheme for prosecuting federal officials guilty of various types of corrupt activities. 18 U.S.C. § 201(c) dealt with accepting bribes and § 201(g) with accepting illegal gratuities. [15] Extortion by federal officials is dealt with in 18 U.S.C. § 872:

§ 872. Extortion by officers or employees of the United States

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15. Section 201(c):

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on

Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of office or employment commits or attempts an act of extortion, shall be fined not more than $5,000 or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed $100, he shall be fined not more than $500 or imprisoned not more than one year, or both.

It is interesting and significant that in all three statutes the U.S. Congress establishes far less severe penalties for

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the United States; or

(3) being induced to do or omit to do any act in violation of his official duty;

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States Section 201(g):

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him;

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both. The statutory language of Section 201 is not free from ambiguity. For a discussion of the problems of distinguishing among bribery, illegal gratuities and lawful activities see *U.S. v. Brewster,* 165 U.S. App.D.C. 1, 506 F.2d 62 (D.C. Cir. 1975).

federal officials than the Hobbs Act does for even a minor local official engaged in the same conduct, if the Hobbs Act means what the government contends it does. While the extortion provision in the Hobbs Act applies to federal as well as local officials, we have found no reported case involving the prosecution thereunder of a federal official.

The federal employee extortion statute does not define the term extortion. Apparently, prosecutions are rare, especially in recent years. There are few reported cases interpreting the statute; two of which have come to our attention apply inconsistent definitions of extortion. In 1947, the Seventh Circuit interpreted 18 U.S.C. § 171, which for all relevant purposes is the identical predecessor of § 872. [16] The court held that "extortion" in that statute "is used in its common ordinary sense as distinguished from the sense in which it was known at common law." The court held that the statute

. . . does more than substitute color of office for fear, threats,

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16. *U.S. v. Sutter,* 160 F.2d 754 (7th Cir. 1947). 18 U.S.C. § 171 provided:

1. "Every officer, clerk, agent, or employee of the United States, and every person representing himself to be or assuming to act as such officer, clerk, agent, or employee, who, under color of his office, clerkship, agency, or employment, or under color of his pretended or assumed office, clerkship, agency, or employment, is guilty of extortion, and every person who shall attempt any act which if performed would make him guilty of extortion, shall be fined not more than $500 or imprisoned not more than one year, or both." (R.S.Sec. 5481; June 28, 1906, c. 3574, 34 Stat. 546; Mar. 4, 1909, c. 321, Sec. 85, 35 Stat. 1104).

or pressure. The use of official position must be coupled with extortion. Under this statute, a Federal employee is guilty only if he uses his office to place another under compulsion of fear, force, or the undue exercise of power, so that such person parts with something of value unwillingly and involuntarily. [17]

In an earlier case, the Second Circuit held that Section 171 should be interpreted to adopt the common law definition of extortion:

> Extortion is the unlawful taking by any officer under color of his office of any money or thing of value that is not due him, or more than is due, or before it is due. [18]

This common law definition, it is submitted, by use of the words "unlawful" and "taking" implies the threat of economic loss by virtue of the imposition or withholding of official action and thus distinguishes the more serious crime of extortion from bribery.

In any event, the extortion statute as to federal officials has never been interpreted as broadly as the interpretation of the Hobbs Act as to local officials suggested by the government. It is noteworthy that Congress dealt with federal officials as to bribery, illegal gratuities and extortion in separate sections of Title 18. If Congress meant to include all such activi-

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17. 160 F.2d at 756.

18. *Martin v. U.S.*, 278 F. 913 at 917 (2nd Cir. 1922).

ty by local officials under the term "extortion" in the Hobbs Act, the statute could have so specified. Bribes and illegal gratuities can affect interstate commerce as much as extorted payments can. If Congress meant by the last phrase of the Hobbs Act definition "under color of official right" to include the solicitation of a bribe it would have inserted "or by solicitation of a bribe" in the statute in lieu of "or under color of official right".

Given the ambiguities of the common law and the absence of clear Congressional intent, the courts have been forced to speculate as to the exact parameters of the offense defined by the Hobbs Act. As a result, public officials are not given fair warning as to whether their activities are criminal or not.

One of the primary and most serious problems with vague statutes is that they encourage arbitrary arrests and convictions. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972). Such laws place undue discretion in the hand of the police and the prosecutor.

The court is convinced that the Hobbs Act, when employed to prosecute the "obtaining of property from another, with his consent, (induced). . . under color of official right" presents just such a problem. Under the words of this statute, whether one is prosecution and convicted or not may ultimately depend not upon one's conduct, but upon one's popularity, political affiliation, influence, and even personality. Potential

abuse and erratic verdicts are inherent in the ambiguities of this statute. Examples have already been given of public official conduct apparently covered by the words of the statute, but never prosecuted.

We recognize that decisions in some other circuits interpret the pertinent part of the Hobbs Act extortion definition as does the government. Under these decisions, the court's charge would be proper, the statute would be held Constitutional, and the conviction would stand. [19] However, we have found no such decision in this Circuit or by the U.S. Supreme Court, nor has the government. Other cases lend support for our conclusion as to the meaning of the definition, if it is constitutional. [20] In the one Fifth Circuit decision which deals with issues similar to those here, Judge Wisdom distinguishes between extortion and bribery, extortion involving an element not necessary to bribery, i.e., duress or threat of harm:

> It is the wrongful use of an otherwise valid power that converts dutiful action into extortion. If the purpose and effect are to intimidate others, forcing them to pay, the action constitutes ex-

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19. *U.S. v. Kenny*, 462 F.2d 1205 (3rd Cir. 1972); *U.S. v. Braasch*, 505 F.2d 139 (7th Cir. 1974); *U.S. v. Kuta*, 518 F.2d 947 (7th Cir. 1975); *U.S. v. Mazzei*, 521 F.2d 639 (3rd Cir. 1975); *U.S. v. Trotta*, 525 F.2d 1096 (2nd Cir. 1975); *U.S. v. Hall*, 536 F.2d 313 (10th Cir. 1976); *U.S. v. Harding*, 563 F.2d 299 (6th Cir. 1977).

20. *U.S. v. Hyde*, 448 F.2d 815 (5th Cir. 1971); *U.S. v. Addonizio*, 451 F.2d 49 (3rd Cir. 1972); *U.S. v. Hathaway*, 534 F.2d 316 (1st Cir. 1976).

> tortion. Put another way, it is the right to impartial determination of the issue on the merits (i.e. whether to enforce the law or whether to picket or strike) that the victim is deprived of when these actions are taken for the purpose of coercing him into paying. The distinction from bribery is therefore the initiative and purpose on the part of the official and the fear and lack of voluntariness on the part of the victim. [21]

[3] Applying the distinction in *Hyde* between extortion and bribery we hold that if the pertinent part of the definition of extortion in the Hobbs Act is constitutional, it does not cover solicitation by a public official of a bribe or of a gratuity, absent the element of threat or duress.

Nothing herein should be construed to condone the activities of defendant or the other participants. Their actions were highly unethical and reprehensible. That the evidence may support state bribery charges against them is not the issue before us. That the resolution of the issues we must decide may result in these activities going unpunished is unfortunate but irrelevant. [22] However high their motives may be, govern-

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21. *U.S. v. Hyde*, 448 F.2d 815 at 833 (5th Cir. 1971).

22. The words of Judge Rubin in a case decided after this order was issued but before publication of this opinion, *U.S. v. McInnis*, 601 F.2d 1319 at 1327 (5th Cir. 1979), are particularly pertinent:

> There is still truth in ancient wisdom and law in maxims older than, but respected by, the Constitu-

ment prosecutors should not be permitted, in order to suppress a perceived modern evil, to give to an ancient statute a new interpretation never intended by the Congress. [23]

APPENDIX

INDICTMENT

The Grand Jury charges that:

AT ALL TIMES HEREIN:

1. HENRY E. WILLIAMS was a member of the Jefferson Parish School Board, an elective office in Jefferson Parish, Louisiana.

2. Louisiana Computing Corporation was a corporation, incorporated under the laws of the State of Louisiana, under contract to the Jefferson Parish School Board to provide computer services. On July 7, 1976, HENRY E. WILLIAMS, seconded a motion for renewal of the Jefferson Parish School Board contract with Louisiana Computing Corporation.

COUNT 1

On or about April 1, 1976, in the Eastern District of Louisiana, HENRY E. WILLIAMS, while serving as a member

> tion. Criminal statutes are to be strictly construed. Penal statutes must not be stretched to enable the government to prosecute a defendant merely because what he has done is vile, or, as the government here suggests, a violation of state law that is likely to go unpunished by state authorities (citations omitted).

23. *See 3 Seton Hall* L.Rev. 1 urging just such a course of action.

of the Jefferson Parish School Board, an elective office in the State of Louisiana, did knowingly, willfully and unlawfully attempt to and did obstruct, delay and affect interstate commerce as that term is defined in United States Code, Section 1951 (b)(3), by means of extortion, in that the defendant did unlawfully seek, ask, solicit and receive, under the color of official right, the sum of $4,000 cash from a contractor doing business with the Jefferson Parish School Board, which money was not due him or his office and to which neither he nor his office was entitled, from a contractor with the Jefferson Parish School Board; all in violation of Title 18, United States Code, Section 1951.

COUNT 2

From on or about June, 1976, until on or about October, 1976, in the Eastern District of Louisiana, HENRY E. WILLIAMS, while serving as a member of the Jefferson Parish School Board, an elective office in the State of Louisiana, did knowingly, willfully and unlawfully attempt to and did delay and affect interstate commerce as that term is defined in Title 18, United States Code, Section 1951(b)(3), by means of extortion, in that defendant did unlawfully seek, ask, solicit and receive from a former official of Louisiana Computing Corporation, under color of official right, the sum of approximately $13,000 cash, generated by the payments of fictitious bonuses to employees of Louisiana Computing Corporation, which money was not due Williams or his office, and to which neither he nor his office was entitled; all in violation of Title 18, United States Code, Section 1951.

COUNT 3

From on or about June 19, 1975, until on or about October 31, 1976, in the Eastern District of Louisiana, HENRY E. WILLIAMS, while serving as a member of the Jefferson Parish School Board, an elective office in the State of Louisiana, did knowingly, willfully and unlawfully attempt to and did delay and affect interstate commerce as that term is defined in Title 18, United States Code, Section 1951 (b)(3), by means of extortion, in that defendant did unlawfully seek, ask,solicit and receive from Louisiana Computing Corporation, under color of official right, airline tickets valued at approximately $1,209.46 as follow:

Date of Ticket Purchase	Destination	Passenger	Amount	Approximate Date of Flight/Return
(1) 6/19/75	Las Vegas	Mr. Henry E. Williams	$338.73	6/26/75 6/30/75(return)
6/19/75	Las Vegas	Mrs. Henry E. Williams	$338.73	6/26/75 6/30/78*(return)
*(Memo by District Court: The return date of 6/30/78 is obviously a typographical error, the correct date is 6/30/75)				
(2) 6/23/76	Las Vegas	Mr. Henry E. Williams	$264.00	6/24/76 6/25/75(return)
(3)10/26/76	Las Vegas	Mr. Henry E. Williams	$264.00	10/28/76 10/31/76(return)

paid for by Louisiana Computing Corporation which tickets were not due Williams or his office, and to which neither he nor his office was entitled; all in violation of Title 18, United States Code, Section 1951.

CHARGE TO JURY

What does the law mean when it prohibits and makes it criminal for a public official to obtain something of value induced by color of official right? This is, of course, unusual language, language which we don't use in our everyday lives, and therefore requires special explanation.

To induce an act means to influence or persuade it to be done, to bring something about, to cause it to happen. By color of official right means as a result of one's official position. But more is needed before conduct is criminal, than merely the act of a public official obtaining something by persuading someone to give it to him because he is a public official; otherwise, every time an incumbent public official runs for reelection and solicits campaign contributions he would be guilty of a crime under this statute. What is the additional element? There must be proof that the defendant wrongfully used his official power to obtain something to which he was not entitled. The government must prove that the public official persuaded someone to give him something of value by indicating, either expressly or impliedly, either at that time or previously, that as a result, the public official would favor him in his official capacity. It is not enough for the giver alone to think that he'll get some favor from the public official; the public official must have indicated

that to him as part of the inducement for the act.

As applied to this case, the defendant would be guilty if you find as to the acts covered by any count of the indictment that the government has proved beyond a reasonable doubt that Henry Williams did all of the following:

> persuaded or influenced someone to pay him money (as to count one or two) or furnished him airline tickets (as to count three)
>
> because he was a public official at the time
>
> and indicated to the person whom he persuaded or influenced either by Williams' words or actions, either at the time of the payment of money or furnishing of airline tickets or previous thereto, that as a result of the giving of money or furnishing of airline tickets, he, Williams, in his official capacity as a school board member would favor that person.

For defendant't activities involved in this case to be covered under this statute, you must be convinced beyond reasonable doubt that Mr. Williams obtained money or airline tickets and that the act of giving the money or furnishing the airline tickets was brought about or caused by Henry Williams leading Brandin (with respect to Count One) or Louisiana Computer Corporation (with respect to Counts 2 or 3) to believe that if they gave him money or airline tickets, Williams in his capacity as a school board member would favor the giver.

To prove the crime charged in this case, the govern-

ment need not prove that the payments to the defendant were the result of force or coercion on his part or from fear on the part of the giver.

It is not necessary that the defendant as a School Board member have the power and authority to perform the acts he claimed, but whether it is reasonable, looking at all the surrounding circumstances, for the subject to believe that the defendant had that authority or power.

Gilbert F. Ganucheau
Clerk

October 27, 1980

TO ALL PARTIES LISTED BELOW:

No. 79-2584 U.S.A. -vs- HENRY E. WILLIAMS
(CR-79-46 "H")

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

BY _____
Deputy Clerk

cc: Mr. Richard T. Simmons, Jr.,
Mr. Virgil M. Wheeler, Jr.,
Mr. Herbert Shafer